Supreme Court, U.S.
FILED
MAR 11 1991
OFFICE OF THE CLERK

(2)

No. 90-1300

In The

Supreme Court of the United States

October Term, 1990

DEAN WITTER REYNOLDS, INC.
and CRAIG NELSON,

Petitioners,

v.

LINDA STROTZ,

Respondent.

**Petition For A Writ Of Certiorari
To The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division Two**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MELANIE FISCH*
ROBERT F. SCHAUER
COVINGTON & CROWE
1131 West Sixth Street, Suite 300
Post Office Box 1515
Ontario, California 91762
(714) 983-9393

Counsel for Respondent Linda Strotz

*Counsel of Record

March 11, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether arbitration clauses contained in three seperate agreements are enforceable under the Federal Arbitration Act, where the agreements and the arbitration clauses therein were procured through fraud in the execution, and where the parties seeking to enforce the arbitration clauses breached their fiduciary duty to disclose to the other party all material facts concerning the principal agreements and the arbitration clauses.

TABLE OF CONTENTS

Page

JURISDICTION 1

STATEMENT OF THE CASE 1

MISSTATEMENTS OF FACT AND LAW IN THE PETITION FOR WRIT OF CERTIORARI SUPPORT DENIAL OF THE PETITION 6

REASONS FOR DENYING THE PETITION 9

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS CONSISTENT WITH THE LANGUAGE OF THE ARBITRATION ACT AND THE SEPARABILITY RULE 10

II. THE DECISION OF THE CALIFORNIA COURT OF APPEAL DOES NOT UNDERMINE THE GOALS OF THE ARBITRATION ACT 14

III. THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS NOT PREEMPTED BY FEDERAL LAW UNDER THE ARBITRATION ACT 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998 (11th Cir. 1986) 12, 13

Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282 (9th Cir. 1988) 12, 17

Ford v. Shearson Lehman American Express, Inc., 180 Cal.App.3d 1011, 225 Cal.Rptr. 895 (1986) .. 6, 7, 8, 17

Main v. Merrill Lynch, Pierce, Fenner & Smith, 67 Cal.App.3d 19, 136 Cal.Rptr. 378 (1977) 6, 7, 17

Moseley v. Electronic & Missile Facilities, Inc., 374 U.S. 167, 83 S.Ct. 1815, 10 L.Ed.2d 818 (1963) 11, 12, 13

Perry v. Thomas, 482 U.S. 483, 107 S.Ct. 2332, 96 L.Ed.2d 428 (1987) 16

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) ..... *passim*

Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) 17

Volt Information Sciences, Inc. v. Stanford University, 489 U.S. 468, 109 S.Ct. ___, 103 L.Ed.2d 488 (1989) 14

STATUTES

9 U.S.C. section 2 14

9 U.S.C. section 3 10

9 U.S.C. section 4 10

28 U.S.C. section 1257(a) 1

Respondent Linda Strotz respectfully prays that this Court deny the Petition for a Writ of Certiorari ("Petition") filed by Dean Witter Reynolds, Inc., and Craig Nelson on February 12, 1991.

JURISDICTION

This Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

In about November 1979, Respondent Linda Strotz ("Strotz") opened an investment account at Petitioner Dean Witter Reynolds, Inc. ("DWR"). Strotz, a young widow, opened the account with proceeds of a life insurance policy she received on the death of her husband. She had no previous experience investing money in securities. Strotz was evaluated by DWR as an unsophisticated client whose primary investment objectives were to earn income and safeguard her principal. Accordingly, DWR invested her funds in conservative stocks.

Strotz' problems began in October 1985, when she transferred her account to DWR's Upland office, and Petitioner Craig Nelson ("Nelson") became her account executive. From the outset, DWR and Nelson (collectively, "Petitioners") urged Strotz to invest in "OEX index options." OEX index options are extremely risky investments, totally unsuited to an inexperienced investor who wishes to protect principal and earn interest. However,

Petitioners misrepresented these facts and advised Strotz that OEX index options were safe, sure, and conservative investments. Petitioners' representations convinced Strotz to invest in OEX index options.

In connection with the transfer of her account, Petitioners required Strotz to sign documents, including a Customer's Agreement and an Option Client Information form[1] ("the 1985 contracts"). Unbeknownst to Strotz, both documents were standardized, preprinted contracts of adhesion, which were prepared, presented and imposed on Strotz by Petitioners without any opportunity for her to negotiate any of the terms of the contracts, including the arbitration clauses contained therein. Petitioners shoved the documents in front of Strotz, gave her no opportunity to read them, affirmatively told her it was not necessary to read them, and told her the documents were for the sole purpose of opening her account and that they did not affect her legal rights. Petitioners failed to advise Strotz that these documents were contracts, or that they contained arbitration clauses. Strotz, who was untrained and inexperienced in investing, did not know or understand that these documents, including the arbitration clauses, were, in fact, contracts and not simply forms to open her account. Had she known the true nature and contents of the documents, she would not have signed them. Strotz believed she was signing documents which merely opened her Upland account with

---

[1] The title of this document gives no clue that it is in fact a contract with legal effect. Two such forms are reprinted in Petitioner's Appendix D at 8d-14d and 15d-18d. The appearance of these forms as shown in Appendix D is misleading and bears no resemblance to the appearance of the actual documents imposed on Strotz.

DWR and did not understand the intended effect of the arbitration clauses. Strotz therefore never agreed to submit all controversies arising from the agreements to arbitration. *See* Appendix A to Petition ("Pet.App.A") at 3a.

Thereafter, Petitioners invested Strotz' account in OEX index options. Petitioners controlled Strotz' account, and she at all times relied on their advice, recommendations, superior knowledge and skills in making investments. Strotz placed her total confidence and trust in Petitioners, relied on their judgment and expertise, and believed they would deal fairly and justly with her in all matters. Therefore, a fiduciary and/or confidential relationship existed between Strotz and Petitioners.

Petitioners made an excessive number of OEX index options transactions for Strotz' account without Strotz' knowledge or consent and at times when Strotz' account lacked sufficient funds to cover the transactions. Petitioners made these excessive transactions to earn excessive commissions, at Strotz' expense. Petitioners wrote the transactions knowing that OEX index options are in fact extremely risky investments which should not be undertaken by anyone with inadequate net worth and whose investment purpose is to protect principal and earn a reasonable income.

Throughout 1985, Petitioners lost substantial funds belonging to Strotz by investing her account in OEX index options. Petitioners failed to inform Strotz fully of the extent of her actual losses as a result of their investment advice and activities.

From time to time, Petitioners sent Strotz documents and form letters in the mail. Strotz would call Nelson to ask about the documents. Nelson always assured Strotz the documents were just standard documents, required by DWR in connection with its accounts, that there was no cause to worry, that she should sign them, and that she did not need to keep copies. Here again, Strotz did not know that one of these documents, a second Option Client Information,[2] was a contract containing a fine-print, boilerplate arbitration clause. She did not know or understand the true nature and contents of this document and did not know it contained an arbitration clause. If she had known these facts, she would not have signed the document. Strotz, in fact, never agreed to the arbitration clause therein.

Throughout 1986 and 1987, Petitioners continued to make excessive and inappropriate trades against Strotz' account, and failed to advise her of the full extent of her losses. In about mid-October 1987, Petitioners lost Strotz' entire account from their investments in OEX index options. Petitioners then sold all of Strotz' stock and property in their possession to cover the OEX index option transactions. As a result, Strotz lost at least $180,000.00.

On or about September 22, 1988, Strotz filed a verified complaint against Petitioners in the California Superior Court for the County of San Bernardino, West District. Thereafter, on November 22, 1988, Strotz filed a

---

[2] A box at the top of the form shows the purpose of the document is "Account Data Update." *See* Appendix D to Petition at 15d.

verified first amended complaint against Petitioners. The first amended complaint includes causes of action for rescission and voiding of the agreements based on, inter alia, fraud in the inducement and fraud in the execution.

Petitioners then filed a petition to compel arbitration and a motion to stay proceedings. Strotz filed opposition to the petition, including two declarations of Strotz. The declarations amplified the allegations in the verified first amended complaint regarding the misrepresentations of Petitioners as to the three agreements and the arbitration clauses at issue. The declarations supported the allegations of fraud in the execution and in the inducement of both the subject agreements and the arbitration clauses contained therein. The trial court issued an order denying the petition to compel arbitration.

Petitioners appealed the order and argued, inter alia, that Strotz could not avoid the agreements by failing to read them, that the trial court's order would lead to "procedural gamesmanship," and that the trial court's order was contrary to the "separability rule" set out by the United States Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

Strotz filed a responding brief in which she argued that the trial court's order was consistent with state and federal law, including *Prima Paint*, and that the order was properly based on Strotz' pleadings and declarations, which sufficiently alleged fraud in the execution and inducement of the agreements and the arbitration clauses

therein. Strotz further argued that under California law, Petitioners had a fiduciary or confidential relationship with Strotz which gave rise to a duty to disclose to her all material facts about the agreements and transactions.[3] The California Court of Appeal affirmed the trial court's order in an opinion filed on August 27, 1990. *See* Pet.App.A.

Petitioners sought rehearing in the Court of Appeal, which was denied on September 21, 1990. Petitioner's Petition for Review to the Supreme Court of the State of California was denied on November 14, 1990. Petitioners filed their Petition for Writ of Certiorari on February 12, 1991. Respondent received the Petition on February 15, 1991.

MISSTATEMENTS OF FACT AND LAW IN THE PETITION FOR WRIT OF CERTIORARI SUPPORT DENIAL OF THE PETITION

The Petition before this Court contains material misstatements of fact and law which mandate denial of the Petition. Petitioners incorrectly state the substance of Strotz' fraud allegation is that she did not read the subject contracts before signing them. *See* Petition at 3 n.1. In fact, the substance of Strotz' fraud allegations is that Petitioners had a fiduciary duty to advise her of all material facts concerning the nature and effect of the documents she was signing, as well as the nature of the

---

[3] This rule of law was set forth in *Main v. Merrill Lynch, Pierce, Fenner & Smith*, 67 Cal.App.3d 19, 32, 136 Cal.Rptr. 378 (1977), and *Ford v. Shearson Lehman American Express, Inc.*, 180 Cal.App.3d 1011, 1020, 225 Cal.Rptr. 895 (1968).

investments recommended, that Strotz unknowingly signed contracts in which she waived her rights to trial of any disputes arising therefrom, and that Petitioners actively concealed and suppressed these material facts, in violation of their fiduciary duty, thereby committing fraud upon Strotz.

The California courts long ago established that a confidential relationship exists between a securities broker and its client. *Ford v. Shearson Lehman American Express, Inc.*, 180 Cal.App.3d 1011, 1020, 225 Cal.Rptr. 895 (1986); *Main v. Merrill Lynch, Pierce, Fenner & Smith*, 67 Cal.App.3d 19, 31-33, 136 Cal.Rptr. 378 (1977). Where a fiduciary or confidential relationship exists, the party with the superior knowledge has a duty to disclose all material facts to the other party. The *Main* court stated, at page 32:

> It is the settled law of this state, and elsewhere, that " '[W]here there exists a relationship of trust and confidence it is the duty of one in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question and any concealment of material fact is a fraud.' " [Citations.] " 'Where there is [such] a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action.' " [Citations.]

See also Ford, 180 Cal.App.3d at 1020 (citing *Main*). The existence of this relationship relieves a party from the failure to read documents. *See* Pet.App.A at 14a.

The second factual misrepresentation is Petitioners' claim that Strotz failed to allege in the first amended complaint that the arbitration agreements contained in the 1985 contracts were obtained by fraud. *See* Petition at 3, 4. In fact, Strotz plainly alleged in the first amended complaint that she was not advised of the agreements to arbitrate, and that she did not know the true nature and effect of the documents she signed or the agreements to arbitrate contained therein. *See* Pet.App.A at 3a. Strotz also alleged that the 1985 contracts were invalid based on fraud in the execution of the agreements and the arbitration clauses as well as fraud in the inducement. Further, the declarations of Strotz, submitted to the trial court in opposition to Petitioners' petition to compel arbitration, contained testimony going directly to the arbitration agreements. *See* Pet.App.A at 3a-4a.

Third, Petitioners incorrectly argue "the alternative theory" in the *Ford* case, relied on by the California Court of Appeal herein, was not briefed or argued by the parties. *See* Petition at 6. This theory states that if a party is unaware he is signing any contract, and the contract contains an arbitration clause, the party is also unaware that he is agreeing to arbitration. Therefore, an allegation of fraud in the inception or execution of the contract is necessarily directed at both the principal contract and the arbitration agreement contained therein. *See* Petition at 13; Pet.App.A at 12a-13a.

Contrary to Petitioners' contention, the first amended complaint and the declarations of Strotz set forth sufficient allegations of fraud in the execution of the agreements and the arbitration clauses. Strotz argued the agreements and the arbitration clauses therein were

obtained through fraud in the execution in her opposition to the petition to compel arbitration and responding brief on appeal. The facts and the law on this issue were therefore properly before the Court of Appeal.

These errors undermine the instant Petition and demonstrate that no substantial unsettled federal question is presented therein. The question presented to this Court was properly rejected by the California courts of appeal, in harmony with the applicable federal and state law. Therefore, Strotz respectfully submits the Petition should be denied.

REASONS FOR DENYING THE PETITION

The decision of the California Court of Appeal does not, as Petitioners contend, seriously threaten the enforcement of arbitration agreements. Neither does the decision contradict the express language of the Federal Arbitration Act and the applicable decisional law. Taken to its logical extension, Petitioners' theory is that all arbitration agreements are enforceable, even where they are procured through fraud. This contention, and not the decision, is contrary to law.

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS CONSISTENT WITH THE LANGUAGE OF THE ARBITRATION ACT AND THE SEPARABILITY RULE.

Petitioners incorrectly argue the theory of fraud in the execution relied on by the California Court of Appeal is contrary to the language of the Federal Arbitration Act and the "separability rule" set forth by this Court in *Prima Paint*[4]. This argument lacks any merit. The express language of the Federal Arbitration Act and the decisional law mandate enforcement of arbitration agreements only where a valid arbitration agreement exists.

Section 2 of Title 9 of the United States Code provides in pertinent part:

> [A] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, *save upon such grounds that exist at law or in equity for the revocation of any contract.*

(Emphasis added.) The "savings clause" creates a statutory exception to the mandatory language in Section 2.[5]

In enacting the savings clause, Congress excluded from arbitration those contracts which are revocable on legal or equitable grounds. In *Prima Paint*, this Court

---

[4] Petitioners expressly admit the California Court of Appeal recognized this rule. *See* Petition at 11-12; Pet.App.A at 5a.

[5] Sections 3 and 4 of the Arbitration Act also expressly contemplate court adjudication if the making of the arbitration agreement is at issue. 9 U.S.C. §§ 3, 4.

stated, at 388 U.S. 404 n.12, 18 L.Ed.2d 177 n.12 (emphasis added):

> [T]he purpose of the Congress [in enacting the savings clause of the Arbitration Act] in 1925 was to make arbitration agreements as enforceable as other contacts, but not more so. *To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contracts – a situation inconsistent with the "savings clause."*

Thus, the Arbitration Act, as interpreted by the United States Supreme Court, specifically creates an exception to the rule that arbitration is mandatory, where, as here, the arbitration agreement is procured through fraud.

In *Prima Paint*, this Court found that arbitration clauses are separable from the contracts in which they appear, and that if there are no allegations that the arbitration clauses were procured through fraud, the arbitrator should determine whether the principal contract was induced by fraud. 388 U.S. at 402. The *Prima Paint* Court stated, at 388 U.S. 403-404:

> [I]f the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the "making" of the agreement to arbitrate – the . . . court may proceed to adjudicate it.

The *Prima Paint* decision is in harmony with the earlier decision of this Court in *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167, 83 S.Ct. 1815, 10 L.Ed.2d 818 (1963). In *Moseley*, this Court ruled that where a complaint alleges the entire agreement, including an arbitration clause within it, was induced or procured by fraud, or that voluntary assent was lacking, the issues

of fraud and lack of assent are for the court to adjudicate. *Id.* at 374 U.S. 171. In these circumstances, the court must refuse to compel arbitration. This rule of law was expressly approved in *Prima Paint.* 388 U.S. 403-404 and n.12.

These cases teach that where there is an allegation that an arbitration agreement was procured by fraud, the court must adjudicate the issues of fraud and lack of voluntary assent. As this Court stated in *Moseley,* at 374 U.S. 171 (emphases added):

> Under . . . the Arbitration Act, it seems clear that the issue of fraud should first be *adjudicated* before the rights of the parties under the subcontract can be determined. *It appears necessary, therefore, that the district court proceed first to trial of this issue* . . . .

In *Cohen v. Wedbush, Noble, Cooke, Inc.,* 841 F.2d 282 (9th Cir. 1988), the Court of Appeals for the Ninth Circuit found that an allegation of a failure to advise a client of an arbitration clause goes to the issue of the validity of assent to the arbitration clause and not to the principal agreement. The court stated:

> The contention that Wedbush fraudulently misled the Cohens by failing to inform them of the arbitration clause is not aimed at the entire contract; it bears directly on the validity of their assent to the arbitration clause. This issue is therefore not suitable for arbitration and the courts "may proceed to adjudicate it."

Cohen, 841 F.2d at 286, quoting *Prima Paint,* 388 U.S. at 404. Similarly, in *Cancanon v. Smith Barney, Harris, Upham & Co.,* 805 F.2d 998 (11th Cir. 1986), the court stated, at page 1000:

> Where misrepresentation of the character or essential terms of a proposed contract occurs, assent to the contract is impossible. In such case there is no contract at all.

The *Cancanon* court concluded, at page 1000 (footnote omitted):

> [W]here the allegation is one of fraud in the factum, i.e., ineffective assent to the contract, the issue is not subject to resolution pursuant to an arbitration clause contained in the contract documents.

In the instant case, Strotz specifically alleged both the arbitration agreements and the agreements in which they appeared were procured through fraud in the execution and fraud in the inducement. *See* Pet.App.A at 3a. On these facts, the California Court of Appeal herein correctly found that if a person does not even know she is signing a contract, she cannot possibly be voluntarily assenting to any of the provisions of the contract or to a "separable" arbitration agreement contained therein. *See* Pet.App.A at 12a-13a. Therefore, the issue of fraud is for the court, not the arbitrator. *Id.* at 14a. In reaching this conclusion, the Court of Appeal correctly relied on and followed federal law. *Id.* at 12a-13a. Thus, the decision of the Court of Appeal is in harmony with the language of the Arbitration Act and the separability rule set forth in *Prima Paint*. The Court of Appeal simply followed the reasoning stated in the concurring opinion in *Moseley*, 374 U.S. at 172:

> We agree with the Court that fraud in the procurement of an arbitration contract, like fraud in the procurement of any contract, makes it void and unenforceable and that this question of fraud is a judicial one, which must be determined by a court. To allow this question to be

decided by arbitrators would be to that extent to enforce the arbitration agreement even though steeped in the grossest kind of fraud.

II. THE DECISION OF THE CALIFORNIA COURT OF APPEAL DOES NOT UNDERMINE THE GOALS OF THE ARBITRATION ACT

Petitioners erroneously contend the decision of the California Court of Appeal undermines the goals of the Arbitration Act by threatening the enforcement of arbitration agreements and by allegedly fostering litigation. These concerns are illusory. In fact, the decision furthers the goals of the Act and will decrease litigation by encouraging full disclosure of all material facts to investors.

The policy of the Federal Arbitration Act is to enforce valid arbitration agreements to which the parties genuinely assented. 9 U.S.C. § 2. The Act does not require parties to arbitrate when they have not agreed to do so. *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468, 477, 109 S.Ct. ___, 103 L.Ed.2d 488, 489 (1989). Thus, Petitioners go too far in contending the Act requires the enforcement of all arbitration agreements, even those procured by fraud. Acceptance of this theory would render meaningless the "savings clause" in Section 2 of the Act and the express statement of this Court in *Prima Paint*, that arbitration agreements are not more enforceable than any other contracts. 388 U.S. at 404 n.12. The goals of the Act require arbitration only under valid arbitration agreements.

Petitioners vainly argue the decision permits a party to avoid contractual obligations by merely alleging a

failure to read an agreement before signing it, thereby encouraging "procedural gamesmanship." This argument conveniently ignores the fact that under California law, stockbrokers owe their clients a fiduciary duty to disclose all material facts concerning the documents being signed and the rights being waived. It cannot be seriously argued that it was immaterial that the documents which Petitioners represented as forms to open an account were in fact contracts, which contained arbitration clauses and affected Strotz' legal rights. The Court of Appeal did not approve procedural gamesmanship, but rather properly refused to relieve stockbrokers of their duty to inform their clients that they are signing contracts which affect their legal rights and are not just filling out innocuous forms.

The only arbitration agreements affected by the decision will be those where, as here, the stockbrokers breached their fiduciary duty. Taken to its limit, Petitioners' theory would preclude all allegations of fraud in the execution or inducement of the agreements, thereby impermissibly enforcing all arbitration agreements, even those procured by fraud. The Court of Appeal properly rejected this argument.

Petitioners' concerns respecting an alleged increase in litigation are unfounded. The decision of the California Court of Appeal will discourage litigation by motivating stockbrokers to advise their clients fully concerning the nature of the agreements they are signing and the rights they are waiving. Contrary to Petitioners' contentions, the decision promotes the goals of the Arbitration Act.

III. THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS NOT PREEMPTED BY FEDERAL LAW UNDER THE ARBITRATION ACT.

Petitioners incorrectly argue the decision of the Court of Appeal is preempted by federal law because (1) the decision purportedly "contradicts" the separability rule established in *Prima Paint*, and (2) the decision purportedly imposes an obstacle to accomplishing the goals of the Arbitration Act. As discussed in Sections I and II, *supra*, the decision of the California Court of Appeal is in harmony with the separability rule and the goals of the Arbitration Act.

Nevertheless, Petitioners erroneously contend the decision places burdens on arbitration agreements that do not apply to contracts generally. This argument was properly rejected by the California Court of Appeal. The decision does not establish a special rule for invalidating arbitration agreements. In *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2332, 96 L.Ed.2d 428 (1987), this Court expressly approved the application of state law principles when a court is determining whether an arbitration agreement is revocable. This Court stated, at 96 L.Ed.2d 437 n.8b (emphasis in original):

> An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law* [citation], "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. section 2 (emphases added). Thus, state law whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.

See also Southland Corp. v. Keating, 465 U.S. 1, 17 n.11, 104 S.Ct. 852, 79 L.Ed.2d 1, 16 n.11 (1984).

The California Court of Appeal did not base its holding on state law principles that take their meaning solely from the fact that an arbitration agreement was involved. Nor did the Court of Appeal create or impose special burdens on agreements to arbitrate. Rather, the Court of Appeal looked to general contract law principles regarding fraud in the execution of contracts. *See* Pet.App.A at 12a-14a.

Finally, Petitioners misstate the law in arguing that no other court has created a fiduciary duty on a stockbroker to explain the terms of a contract to a client. *See* Petition at 14. This argument ignores the clear language of the *Cohen, Ford* and *Main* cases.

The decision of the California Court of Appeal properly looked to general contract law principles. Therefore the decision does not conflict with federal law and is not subject to preemption.

CONCLUSION

For the foregoing reasons, Respondent Linda Strotz respectfully requests this Court to deny the instant Petition For A Writ Of Certiorari.

Respectfully submitted,

MELANIE FISCH*
ROBERT F. SCHAUER
COVINGTON & CROWE
1131 West Sixth Street, Suite 300
Post Office Box 1515
Ontario, California 91762
(714) 983-9393

March 11, 1991

Counsel for Respondent Linda Strotz

*Counsel of Record